

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRON CURRY,

Defendant-Appellant.

UNPUBLISHED

May 20, 2004

No. 245254

Wayne Circuit Court

LC No. 02-003230-01

Before: Cooper, P.J., and Griffin and Borrello, JJ.

PER CURIAM.

Defendant Darron Curry appeals by right from his jury trial convictions of two counts of felonious assault, MCL 750.82, two counts of assault with intent to rob and steal while armed, MCL 750.89, and one count of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to 1 to 4 years in prison for each count of the felonious assault, 15 to 30 years in prison for each count of assault with intent to rob and steal being armed, and to a consecutive prison term of two years for felony-firearm. We affirm.

Defendant first argues that the trial court erred in failing to instruct the jury that prior inconsistent statements can be used only to attack credibility but not as evidence of defendant's guilt. However, both parties agreed to the instructions as given, and defense counsel's express approval of a given jury instruction is "a waiver that *extinguishes* any error." *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000) (emphasis in original). Therefore, we consider the issue waived and any error extinguished. But even if we were to consider the issue, we find that defendant failed to demonstrate that there was a likelihood of prejudice even if the court or the prosecution suggested to the jury that the prior inconsistent statements could be used as evidence of guilt. *People v Stanton*, 190 Mich App 558, 562; 463 NW2d 477 (1991). The inconsistent statements at issue pertained to the type of gun used. But because the type of gun was not at issue at trial and did not support or negate defendant's guilt, there was no danger that the statements could have been used as evidence of defendant's guilt. Thus, the trial court did not err by refusing to give the requested instruction.

Next, defendant argues that the prosecutor's remarks during his closing and rebuttal arguments that disparaged defense counsel and vouched for witnesses' credibility, were prosecutorial misconduct that denied defendant his right to a fair trial. We disagree. Because defense counsel made no objections during the prosecutor's closing or rebuttal arguments, the issues are unpreserved. *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999);

People v Schutte, 240 Mich App 713, 720; 613 NW2d 370 (2000). We review issues under the standard set forth below:

To avoid forfeiture of an unpreserved, nonconstitutional plain error, the defendant bears the burden of establishing that: 1) error occurred, 2) the error was plain, i.e., clear or obvious, and 3) the plain error affected substantial rights. *Grant, supra*, 445 Mich 548-549; *Carines, supra* at 763. Reversal is warranted only when the plain, unpreserved error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence. [*People v Jones*, 468 Mich 345, 382; 662 NW2d 376 (2003).]

The prosecutor's remarks were as follows:

And then they go to court and there's some good defense lawyer who gets up there and even though that mother and son know he did it, and the Defendant knows he did it, that slick lawyer gets up there—and I'm not going to say [defense counsel] is a slick lawyer—but that lawyer gets up there and he uses every possible argument and that jury gets confused and they say not guilty and then that mother and son are crying.

“A prosecutor cannot personally attack the defendant's trial attorney because this type of attack can infringe upon the defendant's presumption of innocence.” *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). But however puerile the prosecutor's remarks were, defendant failed to show how the remarks might have misled the jury or how he was prejudiced. We therefore conclude that the remarks were not outcome-determinative plain error. See *Jones, supra*; *Carines, supra*. Moreover, if defense counsel had raised the issue at trial, any error could have been cured by a timely instruction. *Schutte, supra* at 721. “Absent an objection, the ‘judge's instruction that arguments of attorneys are not evidence dispelled any prejudice.’” *Id.* at 721-722, quoting *Bahoda, supra* at 281 and *Green, supra* at 693.

Defendant also argues that the prosecutor vouched for the credibility of his witnesses. The prosecutor cannot vouch for the credibility of his witnesses or infer that he has special knowledge about a witness's truthfulness. *Bahoda, supra* at 276. Because the prosecutor did not imply that he had special knowledge of the witnesses' truthfulness, and because defense counsel questioned the credibility of the witnesses, we conclude that the prosecutor's remarks during his closing and rebuttal arguments were appropriate responses and were not outcome-determinative plain error. See *Jones, supra* at 355; *Carines, supra* at 763. Moreover, any prejudicial effect of the prosecutor's comments could have been cured by a timely instruction, and absent an objection, the “‘judge's instruction that arguments of attorneys are not evidence dispelled any prejudice.’” *Schutte, supra* at 721-722, quoting *Bahoda, supra* at 281 and *Green, supra* at 693. The trial court instructed the jury that the lawyer's statements and arguments were not evidence and provided the standard jury instruction on witness credibility, CJI2d 3.6. The jury is presumed to follow the court's instructions. *People v Lueth*, 253 Mich App 670, 687; 660 NW2d 322 (2002); *Schutte, supra* at 721-722.

Finally, defendant argues that the trial court erred in providing the jury with the deadlocked jury instruction instead of declaring a mistrial. We disagree. Because defense counsel objected to the deadlocked jury instruction, this issue has been preserved for appellate review and will be reviewed for an abuse of discretion. *People v Lett*, 466 Mich 206, 219-220; 644 NW2d 743 (2002). But defense counsel never requested a mistrial; thus, the mistrial issue is unpreserved and will be reviewed for a plain error affecting defendant's substantial rights. *Jones, supra* at 382; *Carines, supra* at 762-763.

The basis for a mistrial exists when a trial court believes that a jury is unable to reach a verdict. *Arizona v Washington*, 434 US 497, 509-510; 98 S Ct 824; 54 L Ed 2d 717 (1978). Our Supreme Court has noted that it remains "cognizant of the significant risk of coercion that would necessarily accompany a requirement that a deadlocked jury be forced to engage in protracted deliberations." *Lett, supra* at 222-223. When a trial court decides to discharge a jury after determining that the jury is deadlocked, that decision "is entitled to great deference." *Id.* at 219-220. Further, this Court has determined that "[a] mistrial should be granted only where the error complained of is so egregious that the prejudicial effect can be removed in no other way." *People v Gonzales*, 193 Mich App 263, 266; 483 NW2d 458 (1992). Each case necessarily depends on its own particular facts, and trial courts should refrain from declaring a mistrial until "a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." *People v Hicks*, 447 Mich 819, 829; 528 NW2d 136 (1994), quoting *United States v Jorn*, 400 US 470, 485; 91 S Ct 547; 27 L Ed 2d (1971).

Approximately 4½ hours into its deliberations, the jury sent the trial court a note stating that one of the jurors was "requesting to be removed," and stating, "She is willing to agree with whatever verdict that will allow her to leave. Please advise." The trial court determined that the deadlocked jury instruction was not yet necessary and instructed the jury that ". . . each and every one of you has been selected because . . . [you] were deemed to be a very fair, impartial person who would take this very awesome responsibility very seriously." The trial court then discharged the jury for the evening telling it that "for the time being, this is the most important thing." The following morning, the jury deliberated for less than 3½ hours and informed the court it was deadlocked at 11-1. It then asked the judge for guidance. At that point, the trial court provided the deadlocked jury instruction. After breaking for lunch and deliberating for approximately one hour, the jury reached a unanimous verdict.

We consider the length of deliberations, the duration and complexity of the trial, and the jury foreperson's opinion regarding whether the jury will be able to reach a verdict when we determine whether a trial court has abused its discretion in declaring or not declaring a mistrial. *Lett, supra* at 223; *People v Riemersma*, 104 Mich App 773, 778; 306 NW2d 340 (1981). In the instant case, the trial was spread out over four days, the jury deliberated for about eight hours, and the foreperson opined that the jury was deadlocked and not likely to reach a verdict even if given extra time. Although the trial was not complex, two victims testified and identified defendant, and two witnesses provided an alibi for defendant, which created significant credibility issues for the jury to decide. Although deliberations in this case may have been longer than those in other cases, the trial court's decision to provide the deadlocked jury instruction instead of declaring a mistrial was not "so grossly in error as to deprive a defendant of a fair trial or to amount to a miscarriage of justice" or an error "so egregious that the

prejudicial effect can be removed in no other way.” *Gonzales, supra* at 265-266. Therefore, the trial court’s decision to provide the deadlocked jury instruction instead of sua sponte declaring a mistrial was neither an abuse of discretion nor plain error.

Affirmed.

/s/ Jessica R. Cooper
/s/ Richard Allen Griffin
/s/ Stephen L. Borrello